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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 190

UNITED TRANSPORTATION UNION,

Petitioner,

VS.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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IN THE

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No. ——

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

United Transportation Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 6, 1970.

OPINION BELOW

The opinion of the court of appeals disposed of appeals by the United Transportation Union, petitioner here, and by the Chicago and North Western Railway Company, petitioner in No. ——, October Term, 1969. That opinion is

reported at 422 F. 2d 979 and is set out as Appendix A to this petition.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1970. No petition for rehearing was filed by either party within the time allowed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a district court, having held on the merits that it is without jurisdiction to enter an injunction in a labor dispute because of the provisions of the Norris-LaGuardia Act, can enter the injunction pending appeal.

STATUTES AND RULES INVOLVED

Sections 1, 4, 5, 7 and 9 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101, 104, 105, 107 and 109, are set forth in Appendix B hereto. The All-Writs statute, 1 Stat. 72, 28 U.S.C. § 1651, and Rule 62 (c) F. R. Civ. P. are also set forth in Appendix B.

STATEMENT

The Chicago and North Western Railway Company filed its suit on November 20, 1969 seeking to enjoin the United Transportation Union from striking over a Section 6 Notice served under the Railway Labor Act which dealt with the number of employees to be used on the railroad's operating crews. The district court had entered a temporary restraining order *ex parte* on the preceding day. This order was continued in effect pending final action by the court after a hearing on the merits. At the conclusion of the rail-

road's case, the court denied the railroad's application for a preliminary injunction and dismissed the complaint.

After entry of the findings of fact and conclusions of law on December 11, 1969, the district court granted the railroad's motion for an injunction against any strike during the pendency of its appeal. Other than monetary damage findings, the district court entered an injunction which contained only the factual findings in the following:

> "Plaintiff having moved for a preliminary injunction against strikes by defendant United Transportation Union, the Court having denied plaintiff's motion for preliminary injunction, plaintiff having stated its intention to file a notice of appeal, plaintiff having moved for an injunction pending appeal, it appearing to the Court that defendant United Transportation Union may engage in a strike against plaintiff if not enjoined therefrom pending appeal, it appearing further that such a strike likely would result in a mooting of the appeal, and it appearing further that such a strike would irreparably injure plaintiff and the public in that plaintiff would be forced to suspend the transportation of passengers and freight . . . ."

The district court entered its order in spite of the fact that it recognized that *E.J.&E.* v. *B.R.T.*, 7 Cir., 302 F. 2d 545 (1962) prohibited such action on its belief that this Court would hold that it is the function of the trial court to grant such injunctions pending appeal (Tr. 563). The United Transportation Union appealed from the injunction pending appeal. The opinion of the court of appeals affirmed the action of the trial court and overruled the *E.J.&E.* case. It is this judgment which is the subject of this petition for writ of certiorari. The opinion also affirmed the judgment denying a preliminary injunction and dismissing the railroad's complaint. That judgment is the subject of a sepa-

rate petition for writ of certiorari by the railroad which will be filed contemporaneously with this petition.

REASONS FOR GRANTING THE WRIT

1. This case decides an important question dealing with the Norris-LaGuardia Act as affected by the judicial power to grant injunctions pending appeal in railroad labor disputes. Such question has not been, but should be, decided by this court because of its substantial magnitude.

2. The decision below is in conflict with the square holding of this Court in *United States* v. *United Mine Workers,* 330 U.S. 258 (1946).

3. The decision of the court below is contrary to the congressional purpose enacted in the Norris-LaGuardia Act and tends to revive a labor injunction business which that Act had obliterated.

4. The decision of the court of appeals wrongly distinguishes between an appeal *pendente lite* and an injunction pending appeal in labor disputes. The correct decision holding that there is no such distinction was enunciated in *Elgin, Joliet & Eastern Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 7 Cir., 302 F. 2d 545, cert. den. 371 U.S. 823 (1962) which case was overruled by the decision below. Permitting that decision to stand will create disruptive rulings and will detrimentally affect the administration by the lower federal courts of both Railway Labor Act injunction cases and other labor injunction cases.

5. The decision below is erroneously based on a finding of mootness and on a non-existent requirement of "meaningful judicial review." Such holdings raise important federal jurisdictional and procedural issues which should be decided by this Court.

ARGUMENT

A. This case decides an important question dealing with the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* as affected by the Railway Labor Act 45 U.S.C. § 151 *et seq.* and the inherent powers of the federal judiciary, particularly as those powers are codified in the All-Writs Act, 28 U.S.C. §1651.[1] That question decided by the court below in favor of the jurisdiction of the federal courts despite the Norris-LaGuardia Act's withdrawal of jurisdiction from the federal courts in what is concededly a labor dispute and in which the procedures of the Railway Labor Act have been exhausted, is a question which has never been decided by this Court and which is of such substantial magnitude that it should be so decided.

This question was before this Court in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry. Co.*, 362 U.S. 330, 342 (1960), and was left unanswered in the following:

> There are other subsidiary questions raised with reference to . . . an injunction pending appeal under Rule 62(c) of the Federal Rules of Civil Procedure. But since we have determined the main controversy between the parties, we think it inadvisable to decide either of these questions now. We intimate no opinion concerning either at this time.

The court below held that the question presented was answered in part, at least by inference, in the concurring opinion of Mr. Justice Frankfurter in *United States* v. *United Mine Workers*, 330 U.S. 258 (1946) at 330 U.S. 307, 310. [The Seventh Circuit's further comment that *Mine*

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1. The Seventh Circuit Opinion also refers to Rule 62(c), 65(e) and Rule 82 of the Federal Rules of Civil Procedure. These rules, while germane, do not affect the phrasing of the basic question presented.

Workers is also apt because it also deals with a ". . . difficult question of jurisdiction" (Appendix A, page 11) is obviously not determinative.] The decision below is an unwarranted reliance on *Mine Workers* and begs the question presented by the Norris-LaGuardia Act. That decision, in favor of the jurisdiction of the federal courts to grant an injunction pending appeal because of its requirement that the Norris-LaGuardia Act by its terms must specifically withdraw such jurisdiction, constitutes an act of judicial arrogance.

As this Court said in *Marine Cooks & Stewards* v. *Panama Steamship Co.,* 362 U.S. 365, 369 (1960), the Congress of the United States, in the Norris-LaGuardia Act, was intent upon taking the courts, both trial and appellate, "out of the labor injunction business." That Act should be construed in light of that purpose; it is not to be derogated to the general powers of the federal judiciary. The court below committed fundamental error when it "struck the balance" in favor of "maintaining the *status quo.*" That action, far from being supported by *United States* v. *United Mine Workers,* 330 U.S. 258 (1946) is, in fact, contrary to the *ratio decidendi* of that decision. That decision holds that the definitions contained in the Norris-LaGuardia Act compel the holding that jurisdiction is withdrawn from the federal courts in all "labor disputes." Only after examining the Act in detail, and as a whole, does the United States Supreme Court hold, in accordance with customary statutory construction, that it did not apply to the Federal Government itself.

The court below, however, seizes on the issuance of the temporary restraining order to preserve the *status quo* pending the district court's decision as to its jurisdiction to provide the asserted "support" for the Seventh Circuit's de-

cision. Such "support" is without substance and precipitates a situation where this Court's supervisory power over the lower federal courts should be exercised. Especially is this so when the very fibre of the Norris-LaGuardia Act has been attacked by the decision below.

The court below purports to consider the Norris-LaGuardia Act in relationship to the All-Writs Act. Its treatment of the effect of the Railway Labor Act is so cursory that it approaches the non-existent. When those 3 Acts are considered together, it is apparent that the provisions of the Norris-LaGuardia Act must be considered to be paramount. Any other treatment results in a subversion of the Norris-LaGuardia Act and revives the labor injunction business in the federal courts as we later point out.

B. To reach its result, the court of appeals overruled *E.J.&E.* v. *B.R.T.*, 7 Cir., 302 F. 2d 545, cert. den. 311 U.S. 823 (1962). It is respectfully submitted that *E.J.&E.* correctly stated the proper policy in these matters and properly interpreted the general purposes of the Norris-LaGuardia Act. In discussing that policy, the Seventh Circuit quotes from *Chicago, Rock Island & Pacific Railroad Co.* v. *Switchmen's Union of North America*, 292 F. 2d 61, 71 (1961) and then states the policy established by the Norris-LaGuardia Act, 302 F. 2d 547, 548:

> "' Beyond this, whatever the general rule as to the scope of review of temporary injunctions may be, no such principle as plaintiffs advocate can be applicable to a claim that such an injunction transgresses the command of § 4 of the Norris-LaGuardia Act. That section uses the most emphatic words possible—'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction' against a peaceful strike. To overcome that bar plaintiffs had the burden of showing, as a matter of

law, that the broad command of § 4 is subject to an exception when a union has violated its duties under the Railway Labor Act and, as a matter of fact, that the defendant here had done that. They were obliged to meet that burden, not simply to show they might be able to meet it; until they met it, the court was without power to issue an injunction whether temporary or permanent.'"

"True, there is a distinction from the case at bar. The Rock Island case was an appeal from a temporary injunction pending a hearing on the merits, while the instant case is a temporary injunction pending an appeal. However, unless some distinction can be drawn between the impact of the Norris-LaGuardia Act on an injunction issued *pendente lite* and a temporary injunction pending a hearing on appeal, the holding of the Second Circuit provides a guide for a decision on the issue before us."

It is respectfully submitted that the Seventh Circuit in *E.J.&E.* correctly stated the policy which should govern the interpretation of the Norris-LaGuardia Act. There can be no meaningful distinction between an injunction *pendente lite* and a temporary injunction pending a hearing on appeal. Each has the same effect. Each breaks the strike.

The judicial construction indulged in by the court below recreates a type of judicial abuse which the Norris-LaGuardia Act attempted to abolish. That Act was passed because of a clear history of strike breaking by injunction. The legislative history recognizes the fact that strikes often were not merely postponed by the issuance of an injunction but were broken never to be revived.

For this reason, the Act was passed with a very clear congressional intent to end any injunctive interference in labor relations. To make perfectly plain that this intent was not to be frustrated by judicial construction, as had

been done so often in the past, the Act did not deal alone with the substantive law to be applied but, instead, withdrew jurisdiction from the federal courts. For that specific reason, the language of the Act uses the term of art, "Court of the United States." That phrase was chosen so as to limit the jurisdiction of all of those courts created by Congress under Article 3 of the United States Constitution. *International Longshoremen's Union* v. *Wirtz,* 170 F. 2d 183 (1948).

The Congress of the United States knew full well that the ingenuity of lawyers was equal to the task of contending in any and all circumstances that "a case of first impression" or a new and novel point of law was present. This congressional purpose was rephrased by Mr. Justice Murphy dissenting in *United States* v. *United Mine Workers,* at 330 U.S. 340:

> "Unlike most other situations, this Act specifically prohibits the issuance of restraining orders except in situations not here involved. There is no exception in favor of a restraining order where there is some serious doubt about the court's jurisdiction; indeed, the prohibition against restraining orders would be futile were such an exception recognized, for the minds of lawyers and judges are boundless in their abilities to raise serious jurisdictional objections."

Nor is the reliance of the court below on practice in other circuits of any value in changing the plain meaning of the Norris-LaGuardia Act. The practice in the other circuits is determined by circumstances. For example, see *Missouri, Kansas, Texas R.* v. *Brotherhood of Railroad Trainmen,* 5 Cir., 342 F. 2d 298 (1965) where the court granted the union all of the relief sought pending the appeal. As even the court of appeals admits, the opinions on which it relies do not discuss the issue presented here "in depth." In-

deed, the union in those cases did not raise the point here involved.

In the instant case, the district judge granted the railroad the identical injunctive relief which it refused when the plaintiff railroad had completed its case at the hearing on the merits. Moreover, the district court granted the union none of the relief which it was requesting under its Section 6 Notice pending the appeal and furthermore denied the union its right to a reasonable attorney's fee under the Norris-LaGuardia Act while permitting it only the customary district court costs. (By a fine distinction, the district court refused to rule on the union's motion to vacate the *ex parte* temporary restraining order finding that it had been rendered moot by the judgment on the merits. Tr. 559)

Ultimately, whether an injunction pending appeal is permitted or prohibited, the decision rests with the district court. The basic thrust of the opinion below implies that the ruling of a district court is less likely to be correct than a ruling by the court of appeals. Such a thesis negatives the purpose of the Norris-LaGuardia Act which was to prohibit any judicial construction by either the district court or a court of appeals. Under the ruling below, the tendency will be to issue injunctions pending appeal in all cases and to effectively nullify the provisions of the Norris-LaGuardia Act, especially in those cases in which the appeal is not expedited as was the instant case.

Though this case involves a determination under the Railway Labor Act, there is no logical reason why it should not be extended to other cases. To the contrary, Railway Labor Act considerations would necessarily seem to preclude its application. As this court has stated on numerous occasions, the Railway Labor Act procedures are purposely long and drawn out. It has been said that "A final and crucial aspect

of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit and Toledo Shore Line R.* v. *United Transportation Union,* 396 U.S. 142, 149, 90 Sup. Ct. 294, 299 (1969). To tack on an injunction pending appeal subsequent to those interminable processes is not to accommodate the Railway Labor Act to the Norris-LaGuardia Act. It is to destroy both Acts and to substitute the district court's discretion.

C. The decision of the court below approves the district court's finding conjecturing that a strike would result in a mooting of the appeal. No authority is stated for this thesis nor is any authority stated for the conclusion (Appendix A, page 11) that failure to grant an injunction pending appeal would constitute a "serious limitation" on judicial review nor for the further statement that otherwise there could be no "meaningful judicial review" (Appendix A, page 13). Such assertions fly in the face of the Norris-LaGuardia Act and the substitution of litigation for negotiation is contrary to the intent of Congress. That Act was enacted with the purpose that all labor disputes should be settled by collective bargaining.

Moreover, both the district court and the court of appeals are in error in their assertions that there is no way of obtaining a decision absent an injunction pending appeal. An appeal absent an injunction is not rendered moot even if a settlement should be made during a strike or under the threat of a strike. Such a settlement would clearly be made under legal duress. Having obtained its strike demands, the union nevertheless would not be entitled to a dismissal of the railroad's appeal. In such circumstances, it well-established that a case is not rendered moot until the appellee is entitled, as a matter of right, to a dismissal of the appeal.

United States v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *N.L.R.B.* v. *General Motors Corporation*, 2 Cir., 179 F. 2d 221 (1950). It is also well settled in Labor Board cases that the Board need not dismiss the proceeding and the Courts need not refuse to enforce the Board's Order because *pendente lite* the original dispute has been settled. *N.L.R.B.* v. *General Motors Corporation, supra,* at 222.

Since the case is not rendered moot as assumed by the courts below, the compelling requirement for an injunction pending appeal is absent here. This being so, the foundation stone for the decision below has been removed. For this reason alone, the decision should be reversed as well as for its patent misconstruction of the Norris-LaGuardia Act.

CONCLUSION

For the reasons adverted to above, and because of the demands of law and the demands of substantial justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 26, 1970.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff-Appellee,

v.

UNITED TRANSPORATION UNION,

Defendant-Appellant.

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Plaintiff-Appellant

v.

UNITED TRANSPORTATION UNION,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that §2, First,[1] of the Railway Labor Act (45 U.S.C. §152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether §2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act[2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the

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1. 45 U.S.C. § 152, First, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

2. Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * * * *

threatened Union strike pending an appeal of its decision of the justiciability of §2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to §6 of the Railway Labor Act (Act) (45 U.S.C. §156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the exist-

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3. Section 6 (45 U.S.C. § 156) provides:

> Carrier and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

ing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

By November of 1969, the parties had held conferences pursuant to §6 (45 U.S.C. §156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to §5 (45 U.S.C. §155);[6] the Board, pursuant

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4. While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under §6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to §6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

5. See footnote 3, *supra*.

6. Section 5 First and Second (45 U.S.C. §155 First and Second) provide:

to §5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to §5. The President had not appointed an Emergency Board

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First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreemen. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

under §10 (45 U.S.C. §106),[7] and the §5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with §2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time

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7. 45 U.S.C. §160 provides:

> If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country or essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.
>
> There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefore approved by the chairman.
>
> After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated §2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

> §2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transportation Union,* No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal

from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elign J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin.* While it may be argued that our decision upholding the district court's denial of a preliminary injunction because of the non-justiciability of §2, First, (see pp. 10-16 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. §1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.,* 316 U.S., 4 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
> *Id.* at 9-10.

See also Hovey v. *McDonald,* 109 U.S. 161 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States* v. *Shipp,* 203 U.S. 563, 573 (1906); *see also Peltway* v. *American Cast Iron Pipe Co.,* 411 F. 2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines* v. *Fusco,* 310 F. 2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin,* the court relied on Rule 82 of the Federal Rules of Civil Procedure F.N. 9

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8. Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

9. Rule 82 provides in relevant part:
These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(e).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-

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10. Rule 65(e) provides:

These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. §2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. §2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Norris-LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction.
>
> 330 U.S. at 290.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers,* that despite the prohibitions of Norris-LaGuardia the district court has inherent

injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, *and eventually of this court,* is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen,* 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters,* 324 F. 2d 217 (9th Cir. 1963); the district court,

though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review. [11] [11a]

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that §2, First, of the Railway Labor Act (45 U.S.C. §152) is non-justiciable. We are of the opinion that §2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe §2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does §2 Second make justiciable what otherwise is not. . . . But §2, Second like §2, First merely states the policy which those other provisions buttress with

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11. We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

11a. Since this opinion overrules *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*

> more particularized commands. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company,* 320 U.S. 323, 334 (1943).

To imply judicial enforcement to §2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co., supra,* the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been small, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate. Id.* at 332-33. [emphasis supplied].

Later in its opinion the Court reiterated:

> [T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready

> to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337.

We believe that §2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

> [I]n every case . . . where the services of the Mediation Board have been requested by either party or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by §5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under §10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if §10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with §2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory-efforts have failed and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

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12. Of course, if one party is not negotiating in good faith as dilatory tactic to prevent the other party from eventually exercis-

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because §2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of §2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, ... U.S. .... (Dec. 9, 1969, Slip Opinion, page 17). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to §2, Ninth[13] (45 U.S.C. §152, Ninth), to determine the proper

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ing self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

13. 45 U.S.C. §152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate

representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret §2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under §2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of §2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we

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such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of represenatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that §2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry* v. *System Federation,* 300 U.S. 515 (1937). In *Virginia Ry.,* the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under §2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that §2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus in fact invoking the dictates of §2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that §2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of §2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including §2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l,* 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U.S. L.W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-Laguardia Act. *Id.* at 636.

and thus held §2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enacting the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need or judicial interference.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, March 6, 1970

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*

No. 18109
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

UNITED TRANSPORATION UNION,
Defendant-Appellant

No. 18145
CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this cause appealed from be, and the same is hereby affirmed, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to these appeals.

APPENDIX B

Section 1 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 101, provides:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 4 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 70, 29 U.S.C., § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 5 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 71, 29 U.S.C., § 105, provides:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in Section 4 of this Act.

Section 7 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Sta. 71, 29 U.S.C., § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been com-

mitted and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate

security in an amount to fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 9 of the Norris-LaGuardia or Anti-Injunction Act of 1932, 47 Stat. 72, 29 U.S.C., § 72, provides:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

The All-Writs statute, 1 Stat. 73, 28 U.S.C. § 1651, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 62(c), F.R. Civ. P. provides:

> Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

Court, U.S.
D
JUL 27 1970
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No [redacted] 190

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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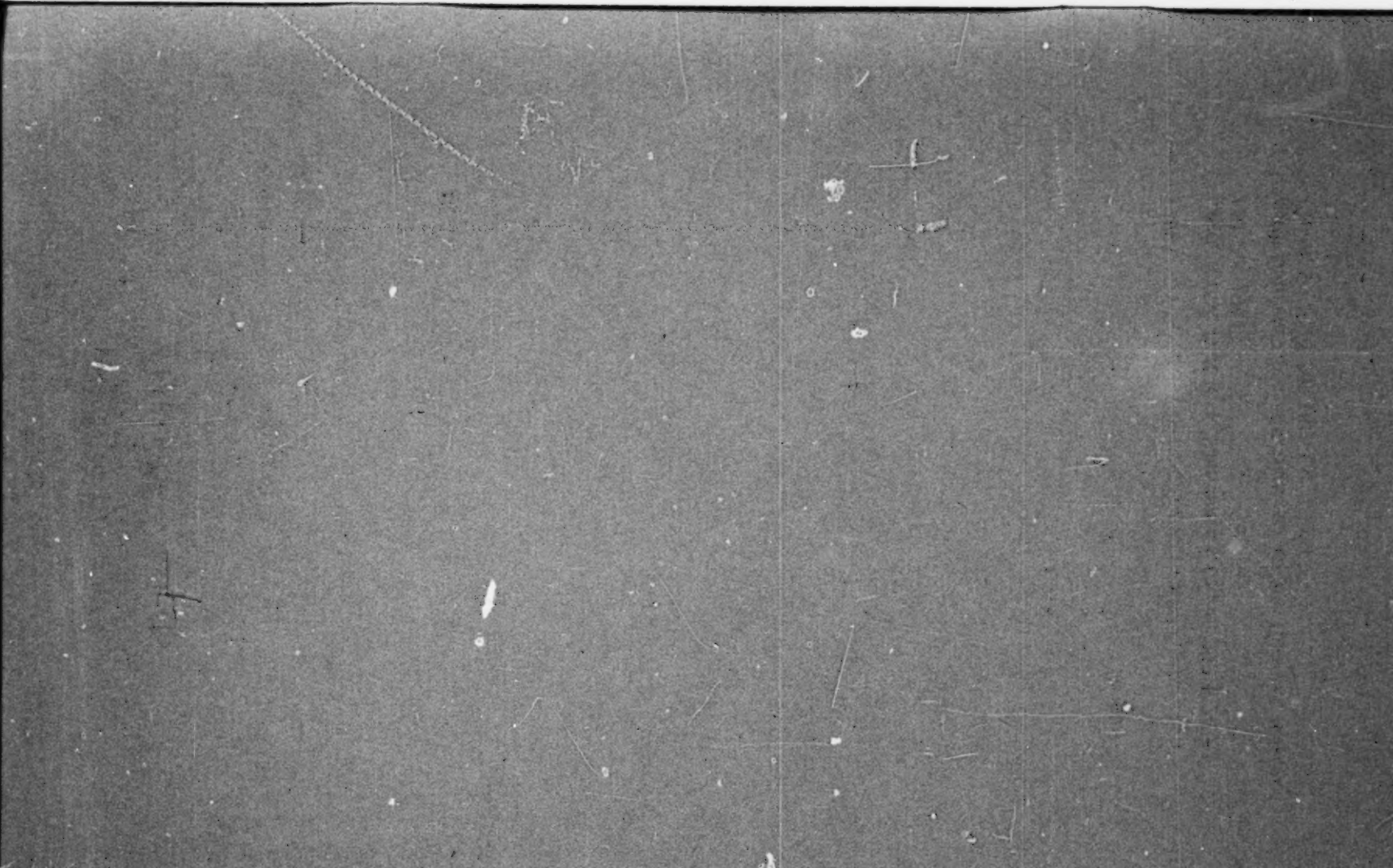

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Piedmont Aviation, Inc. v. Air Line Pilots Ass'n Int'l, 416 F.2d 633 (4th Cir. 1969) 4

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Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §§ 101 *et seq.*:

Generally ..... *passim*

Legislative history, citations to 11

Railway Labor Act. § 2 First, 44 Stat. 577 (1926), *as amended*, 45 U.S.C. § 152 First 2, 3, 5, 12

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1617

UNITED TRANSPORTATION UNION,

Petitioner,

v.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals is reported at 422 F.2d 979 and is set forth as Appendix A to the petition for certiorari. The order of the district court is not reported, but is of course contained in the record.[1] Related findings of fact and conclusions of law by the district court are set forth in Appendix C to the petition for certiorari in *Chicago and North Western Railway Company v. United Transportation Union*, No. 1616 (O.T. 1969).

[1] Because the proceedings in the court of appeals were expedited, there is no appendix.

Jurisdiction

The judgment of the court of appeals was entered on March 6, 1970. The petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Question Presented

In this case, respondent railroad sought an injunction against a strike by petitioner union on the ground that the union had not complied with its obligation under Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) "to exert every reasonable effort to make and maintain agreements." The district court dismissed the action on the ground that the federal courts do not have jurisdiction to enforce that provision of the Railway Labor Act. However, recognizing that there were decisions of other courts to the contrary, that a strike by petitioner union would as a practical matter probably require the respondent to abandon its appeal, and that a strike would in addition cause serious and irreparable damage to the railroad and the public, the district court granted a strike injunction pending appeal. The question presented is whether the district court had jurisdiction to take that action in view of the anti-injunction prohibitions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*

Statutes Involved

The statutes involved are the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, and the "All Writs Act," 28 U.S.C. § 1651. The relevant provisions are set forth in Appendix B to the petition for certiorari.

Statement

The petition by the United Transportation Union ("UTU") seeks review of the same court of appeals judgment that is involved in the petition of respondent Chicago and North

Western Railway Company ("C&NW") in No. 1616, *Chicago and North Western Ry. Company v. United Transportation Company* (O.T. 1969). However, the issues raised in these two petitions are entirely unrelated. In No. 1616, the C&NW seeks review of the court of appeals holding that Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) is not judicially enforceable. In this petition, the UTU seeks review of the court of appeals holding that a federal district court has jurisdiction, notwithstanding the provisions of the Norris-LaGuardia Act (29 U.S.C. §§ 101 *et seq.*), to enjoin a strike pending appeal after that court has decided that the injunctive relief sought by the plaintiff in its complaint is barred by Norris-LaGuardia. The facts relevant to the question of the justiciability of Section 2 First are, of course, set forth in the C&NW's petition in No. 1616. The facts relevant to the Norris-LaGuardia issue raised in this petition by the UTU, which are quite uncomplicated, are stated in full in the court of appeals opinion. Those facts may be summarized as follows:

On November 19, 1969, the C&NW sued the UTU in the United States District Court for the Northern District of Illinois seeking an injunction against a strike threatened by the UTU. The basis for the suit was the C&NW's claim that the UTU, in its negotiations with the C&NW, had not discharged its obligation under Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to bargain in good faith, or, more precisely, to exert "every reasonable effort" to settle the dispute between the parties. After issuing a temporary restraining order, receiving briefs on the C&NW's motion for a preliminary injunction, and hearing the C&NW's witnesses on that motion, the district court, at the conclusion of the C&NW's case, granted the UTU's motion to dismiss the complaint upon the ground that the federal courts have no jurisdiction to decide claims under Section 2 First.

At the time that he orally announced his decision to dismiss the complaint, the district judge acknowledged that, as the court of appeals put it in its opinion, "there was case law contrary to [his] decision." 422 F.2d at 982; Pet. App.

A p. 7.[2] That case law, as the court of appeals noted, included the very recent decision by the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n Int'l,* 416 F.2d 633 (1969), *cert. denied,* 397 U.S. 926 (1970).[3] Accordingly, the district judge indicated that he would entertain favorably a motion by the C&NW for an injunction pending appeal (Tr. 527-28). Subsequently, upon the basis of a formal motion by the C&NW, the district judge granted that injunction, finding that:

> ". . . defendant United Transportation Union may engaged in a strike against plaintiff if not enjoined therefrom pending appeal, it appearing further that such a strike likely would result in a mooting of the appeal, and it appearing further that such a strike would irreparably injure plaintiff and the public in that plaintiff would be forced to suspend the transportation of passengers and freight, with the consequences that plaintiff would be deprived of hundreds of thousands of dollars in revenues each day the strike continued, many of its employees would be deprived of their employment and wages for the duration of the strike, many businesses and governmental agencies would be deprived of essential transportation services, and railroad transportation in a large area of the United States would be seriously impaired so as to impede seriously the transportation in interstate commerce

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[2]The district judge said:

> "I am convinced that this is a matter for the National Mediation Board. I am asked to review it, and I have no jurisdiction to do it, having in mind the Norris-LaGuardia Act, in my judgment. I must apply the law as I believe it is. I recognize the fact that the plaintiffs have cited some cases. There may be some confusion. Some of the other courts have made decisions that I am not prepared to follow because I think I have got to follow the Supreme Court's decisions, myself, on this matter" (Tr. p. 526).

[3]For the many other cases contrary to the lower courts' view respecting the justiciability of Section 2 First, see the petition in No. 1616.

> of passengers, mail, freight and express lading (including Government mail and express, military personnel, and material), and food and other lading essential to the public health and safety . . ." (Order of December 12, 1969).

On the same day that the district court's judgment dismissing the C&NW's case and its order granting the injunction pending appeal were entered, both parties filed their notices of appeal, the C&NW raising the issue of the justiciability of Section 2 First and the UTU raising the issue of the validity of the injunction pending appeal. Three days later, on December 15, 1969, the UTU filed in the court of appeals a motion to vacate the injunction pending appeal, the UTU's principal contention being that the injunction was invalid under the prior Seventh Circuit decision in *Elgin, J. & E. Ry. v. Brotherhood of R. R. Trainmen,* 302 F.2d 545 (1962). Four days later, on December 19, 1969, the court of appeals in substance denied the UTU's motion by ordering that the motion "be taken with the case," but also ordered that the C&NW's appeal and the UTU's appeal be consolidated and expedited. The briefing and argument schedule was sharply telescoped. The C&NW was given ten days for its brief and the UTU an additional six, and the argument was held immediately following, on January 7, 1970.

In its decision of March 6, 1970, the court of appeals affirmed the district court in all respects. The judgment of the court of appeals against the C&NW, which was based upon endorsement of the district court's determination that Section 2 First of the Railway Labor Act is not justiciable, is the subject of the C&NW's petition in No. 1616. The subject of the UTU's petition here at issue is the court of appeals holding

> "that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below." 422 F.2d at 983; Pet. p. A-8.

In so ruling, the court of appeals reversed its prior decision in the *Elgin* case. In that connection, the court noted that this action was agreeable to the full membership of the court:

> "Since this opinion overrules Elgin J. & E. Ry. Co. v. Brotherhood of Railroad Trainmen, 302 F.2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*" 422 F.2d at 985 n. 11a; Pet p. A-13 n. 11a.

Reasons for Denying the Writ

In this case, the court of appeals, having had seven years of experience under the rule urged by petitioner that would deny the federal courts power in any circumstances to issue an injunction pending appeal in a labor dispute, reversed the decision which had established that rule. *Elgin, J. & E. Ry. v. Brotherhood of R.R. Trainmen,* 302 F.2d 545 (1962). In so doing, it brought the law in the Seventh Circuit in accord with the practice in every other federal court, including this Court. The reasons assigned by the court of appeals for its decision, moreover, are persuasive. There is, accordingly, no occasion for further review.

1. As the court of appeals noted, its decision corresponds with the views of other courts of appeals.

> "Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See Missouri-Kansas-Texas RR. Co. v. Brotherhood of Railroad Trainmen, 342 F.2d 298 (5th Cir. 1965); Texas and N.O.RR. Co. v. Brotherhood of Railroad Trainmen, 307 F.2d 151, 153, 163 (5th Cir. 1962); Pan American World Airways v. United Brotherhood of Carpenters, 324 F.2d 217 (9th Cir. 1963); the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); Nor-

folk & P.B.L. RR. Co. v. Brotherhood of Railroad Trainmen, 248 F.2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier)." 422 F.2d at 985; Pet. pp. A.-12-13.

This catalog, moreover, which includes the Fourth, Fifth, and Ninth Circuits, is not complete. To it should be added the following:

a. *This Court.* In *Brotherhood of R.R. Trainmen v. Atlantic C.L. R.R.*, 362 F.2d 649 (5th Cir. 1966), the court of appeals ruled invalid under Norris-LaGuardia an injunction which had been issued by the district court. The carrier then applied to Mr. Justice Black for an injunction pending the filing of, and action upon, a petition for certiorari. The matter was referred by Mr. Justice Black to the full Court, which granted the "application for reinstatement of the limited preliminary injunction" of the district court. *Atlantic C.L. R.R. v. Brotherhood of R.R. Trainmen,* 384 U.S. 967 (1966) (Stay order), 385 U.S. 20 (1967). While the union raised no objections to the injunction or jurisdictional grounds, if petitioner's view of the reach of Norris-LaGuardia urged in the case at bar were correct, then this Court would have been without jurisdiction to grant the injunction; for the construction of Norris-LaGuardia urged by the UTU admits of no discrimination among the levels of the federal judiciary.[4]

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[4]Petitioner says that the phase "court of the United States" (see Sections 1, 4, 5, and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, 104, 105, and 107) "was chosen [by the Congress] so as to limit the jurisdiction of all of those courts created by Congress under Article 3 of the United States Constitution" (Pet. p. 9). Accordingly, we understand petitioner's position to be that once the district court has decided on the merits that Norris-LaGuardia bars an injunction, *no* court can issue an injunction pending appeal. A different position—one that would bar only the district court—would result in depriving of authority the court with intimate knowledge of the case and in investing that authority instead exclusively in courts more remote from the controversy. Petitioner has not, as we have indicated, suggested that the Congress intended such a consequence in enacting Norris-LaGuardia.

b. *The lower federal courts.* In addition to the cases cited by the court of appeals in the case at bar, which arose in the Fourth, Fifth, and Ninth Circuits, we have found cases in the District of Columbia, Second, and Eighth Circuits that accord with the decision below and are inconsistent with the *Elgin* decision and the position urged by petitioner. We have also discovered additional cases in the Fifth and Ninth Circuits.[5] In each of these cases the district court had decided that Norris-LaGuardia precluded plaintiff's claim for injunctive relief. Nevertheless, in each of these cases the court of appeals—or with respect to two of them, the district court in action noted without disapproval by the court of appeals—either granted an injunction pending appeal or stayed a mandate in circumstances where the result was to continue an injunction pending appeal. In at least one of them, moreover—as well as in the *Pan American World Airways* case cited by the court of appeals below—the *Elgin* decision was urged by the union in opposition to the motion for relief pending appeal.[6] The cases are as follows: *Brotherhood of R.R. Trainmen v. Atlantic C.L. R.R.*, 383 F.2d 225 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 1047 (1968) (Order of October 10, 1967, in No. 20,718) (*Elgin* urged by union in Objection to Motion by Appellees for Stay of Mandate or of Transmission of Opinion and Certified Copy of Judgment, pp. 4, 5-6); *Chicago, R.I. & P.R.R. v. Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962) (see Petition for Certiorari in No. 237, O.T. 1961, p. 9);[7] *Donnelly Garment*

[5]It is perhaps worthwhile noting that all of the unreported orders and pleadings cited herein were also cited by respondent in the court of appeals below, so that petitioner has had ample opportunity to, but has not, challenged their authenticity.

[6]As to *Pan American*, 324 F.2d 217, 218 (9th Cir. 1963), see appellee's Memorandum of Points and Authorities in Opposition to Motion For Injunction Pending Appeal in the court of appeals, pp. 22-23. Thus, petitioner is in error in stating that "the union in those cases did not raise the point here involved" (Pet. pp. 9-10).

[7]Petitioner observes that the *Chicago, R.I.* case was cited by the Seventh Circuit as analogous precedent for its decision in *Elgin* (Pet.

[continued]

Co. v. International Ladies' Garment Workers' Union, 99 F.2d 309, 317 (8th Cir. 1938); *Order of Ry. Conductors v. Spokane, P. & S. Ry.*, 366 F.2d 99 (9th Cir. 1966) (Order of October 27, 1966, in No. 20,331), *cert. den.*, 385 U.S. 1025 (1967); *Butte, A. & P. Ry. v. Brotherhood of Locomotive Fire. & Eng.*, 268 F.2d 54, 58 (9th Cir. 1959); *Brotherhood of R.R. Trainmen v. Central of Georgia Ry.*, 229 F.2d 901 (5th Cir. 1956) (Order of April 11, 1956, in No. 15,671), *dismissed as moot*, 352 U.S. 995 (1957); *Missouri-K.-T. R.R. v. Brotherhood of R.R. Trainmen*, 342 F.2d 298, 299 n. 1 (5th Cir. 1965).

2. The experience of the Seventh Circuit Court of Appeals in the years between its decisions in *Elgin* and in the case at bar is instructive, for it suggests the practical inappropriateness of the *Elgin* rule. The fact is that, as its actions demonstrated, even before overruling *Elgin* the court of appeals found that it could not live with the *Elgin* rule and still do justice to the parties. This is what happened: In two cases, including *Elgin* itself, the court of appeals kept district court injunctions in effect pending appeal by staying its mandate to permit the carriers to seek review in this Court. Order of June 18, 1962, in *Elgin* (Nos. 13,444, 13,445 and 13,447); *Pullman Co. v. Order of Ry. Conductors*, 316 F.2d 556 (1963) (No. 13,844). Then, in *Akron, C. & Y. R.R. v. International Bro. of Electrical Workers*, the district court granted an injunction pending appeal despite Norris-LaGuardia and in the face of *Elgin*. See 51 CCH Lab. Cas. ¶ 19,431 (N.D. Ill. 1964), at pp. 32,930-31. The court of appeals then followed the procedure employed in the case at bar by refusing to grant a motion by the union to dissolve the injunction pending appeal and by ordering that

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[continued]
p. 7). But the briefs in *Elgin* disclose that no one had advised the Seventh Circuit that the Second Circuit in *Chicago, R.I.*, following its decision that the district court should not have issued an injunction because of the Norris-LaGuardia, nevertheless stayed its mandate and kept that injunction in effect pending disposition of a petition for certiorari.

motion taken with the case. A later settlement mooted the issue. (Orders of January 25 and February 5, 1965 in No. 14,946). Finally, and most recently, in a case where the district court had refused an injunction pending appeal upon the ground that *Elgin* controlled, the court of appeals itself *granted* the injunction against a strike pending appeal. *Chicago, M., St. P. & P. R.R. v. Brotherhood of Locomotive Fire. & Eng.* (Order of February 23, 1968 in No. 16744). Accordingly, the final and formal demise of *Elgin* hardly came as a surprise; and we suggest that, with respect to the need for further review, significant weight should be attached to the Seventh Circuit's considered and informed judgment, evidently shared by all members of that court (see *supra*, p. 6), that the position urged by petitioner is unsound.

3. The decision of the court below is correct. Because the court's opinion so carefully analyzes the relevant considerations, we here merely summarize them very briefly. First, the power of the federal courts to enjoin the maintenance of the *status quo* pending appeal is inherent in the judicial power and was first codified by the "All Writs Act" contained in Section 14 of the Judiciary Act of 1789, 1 Stat. 73, 81, *as amended*, 28 U.S.C. § 1651. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942); *Hovey v. McDonald*, 109 U.S. 150, 161 (1883). Second, absent Norris-LaGuardia at least, it is established that this power of the judiciary is unaffected by the fact that the lower court has denied relief on jurisdictional rather than on substantive grounds. *United States v. Shipp*, 203 U.S. 563, 573 (1906); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 1002-3 (5th Cir. 1969); *United States v. Brown*, 281 Fed. 657, 663 (8th Cir. 1922); *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962). Third, in judging whether the Congress, by enacting the Norris-LaGuardia Act, intended to strip the courts of this important and traditional inherent power, only an unambiguous expression of such a purpose will serve. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942). Fourth, as the court of appeals said,

"There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal." 422 F.2d at 984; Pet. p. A-10.[8]

[8]In *Elgin*, the court said that the term "temporary injunction" in Norris-LaGuardia covered an injunction pending appeal. 302 F.2d at 545, 548. But in the context in which that term is used, it plainly enough refers only to preliminary injunctions. Thus, Sections 1 and 4 (29 U.S.C. §§ 101, 104) relate to "any restraining order or temporary or permanent injunction"—phrases of art commonly employed to cover only the actions taken by the district court prior to and including final judgment—temporary restraining orders, preliminary injunctions, and permanent injunctions. See also Section 10 of the Act (29 U.S.C. § 110) which, in prescribing the appellate procedure respecting "temporary injunctions," was designed to cover actions relating to preliminary injunctions, not injunctions pending appeal.

If there were any doubt about the point, that doubt would be resolved by examination of the legislative history referred to by the court below. In all the hearings, reports, and debates, we have been unable to discover, and the union has never cited, a single reference to the power of the federal courts to issue injunctions pending appeal. And that legislative history is extensive indeed. Anti-injunction bills were introduced as early as 1925. S. 972 (Shipstead), 67 *Cong. Rec.* 608, 69th Cong., 1st Sess. (1925). Thereafter until passage of the Act in 1932 there were three separate series of hearings, five committee reports, and extensive floor debate. See "Limiting Scope of Injunctions in Labor Disputes," *Hearings before the Senate Committee on the Judiciary on S. 1482*, 70th Cong., 1st Sess. (1928); "Defining and Limiting the Jurisdiction of Courts Sitting in Equity," *Hearings before the Senate Committee on the Judiciary on S. 2497*, 71st Cong., 2d Sess. (1930); *S. Rep. No. 1060* (with minority views), 71st Cong., 2d Sess. (June 18, 1930); "Defining and Limiting the Jurisdiction of Courts Sitting in Equity," *Hearings Before the House Committee on the Judiciary on H.R. 5315*, 72nd Cong., 1st Sess. (1932); *S. Rep. No. 163* (with minority views), 72nd Cong., 1st Sess. (February 4, 1932); *H. Rep. No. 669*, 72nd Cong., 1st Sess. (March 2, 1932); *H. Rep. No. 793* (Conference), 72nd Cong., 1st Sess. (March 14, 1932); *H. Rep. No. 821*, 72nd Cong., 1st Sess. (March 16, 1932); *Senate Debates and Remarks*, 72nd Cong., 1st Sess., 75 *Cong. Rec.* 202, 3370-3372, 4052-4053, 4502-4511, 4591, 4616,

Finally, for the reasons set forth by the court of appeals (422 F.2d at 984; Pet. A-11-12), the decision of this Court in *United States v. United Mine Workers*, 330 U.S. 258, 289-93 (1947), supports the decision below.[9]

4. The important policy considerations that support the rule announced by the lower court are evidenced by the ancient credentials of the judicial power to preserve the *status quo* so as to accord the right to appellate review. This case, moreover, illustrates in concrete fashion the character of those policy considerations. The substantive holding upon which relief was denied the C&NW by the district court—the ruling that federal courts have no authority to enforce the good faith bargaining commands of Section 2 First of the Railway Labor Act—is, for the reasons set forth in detail in our petition for certiorari in No. 1616, a decision of large importance upon an issue as to which the lower courts are divided. Both the importance of the question and the division among the lower courts is, indeed, clear from the court of appeals opinion. The district court, as the court of appeals observed, granted the injunction

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4618-4630, 4676-4696, 4702, 4754-4780, 4907, 4914-4920, 4927, 4939, 4988, 4996-5019, 5527-5528, 5549-5552, 5950-5952, 6188-6189, 6308, 6327-6329, 6448-6455 (1931-1932); *House Debates and Remarks*, 72nd Cong., 1st Sess., 75 *Cong. Rec.* 96, 368, 4702, 4939, 5143, 5462-5515, 5560, 5720, 6014, 6017, 6240, 6282, 6334, 6337, 6493-6494, 6690 (1931-1932).

[9]Petitioner's notion that *Mine Workers* "is, in fact, contrary to the *ratio decidendi*" of the decision below (Pet. p. 6) is frivolous. It is true, of course, as petitioner says, that in *Mine Workers* this Court held that the Norris-LaGuardia prohibitions do not apply where the federal government is the employer (Pet. p. 6). But the Court also, as the lower court in the case at bar pointed out (422 F.2d at 98; Pet. p. A-11), held that the district court's restraining order would have been valid even if it were subsequently determined that Norris-LaGuardia barred injunctive relief on the merits, because the district court had the power to preserve the status quo pending resolution of the jurisdictional issue posed by Norris-LaGuardia. See 330 U.S. at 289-93.

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22 F.2d at 982:
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that the union had not bargained in good fai
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because the district court disagreed with the
decision of the
Court of Appeals for the Fourth Circuit, as
well as of other
federal courts (see *supra* pp. 3-4 and note 3)
, with respect to
the justiciability of claims based upon Sectio
n 2 First of the
Railway Labor Act.

The interests both of equity and of sound judicial administration of the Railway Labor Act would be subverted by so constituting the district court, as the court of appeals put it, "the court of last resort on these matters regardless of the difficulty or novelty of the issues involved." 422 F.2d at 984; Pet. p. A-11. Nor does the policy of protecting labor's right to strike require such a result. If that right is clear, it will presumably be secured promptly by virtue of denial by the trial and appellate tribunals of an injunction pending appeal. If it is not clear, then the decision of the court below means only that its exercise may—depending upon the circumstances of the case—be deferred until an appellate tribunal determines the issue. If the union urges, that appellate review can, of course, be expedited, as it was in this case (see *supra* p. 5). A contrary rule, on the other hand, which would free the union to strike even where it seemed likely that the district court's decision would be reversed, would often result in the exercise of a "right" that did not exist on a proper view of the law. A rule that produces such consequences is not necessary to secure the right to strike. Surely it is enough to say

that *if* the case falls within Norris-LaGuardia the union cannot be enjoined from striking even though its actions are illegal, without saying in addition that the courts are without jurisdiction to preserve the *status quo* so that the court of appeals may resolve a close question as to *whether* the case falls within Norris-LaGuardia.

Conclusion

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

July 27, 1970

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